In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1285

GROENDYKE TRANSPORT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A22-A35) is reported at 372 F. 2d 137. The Board's decision and order in the unfair labor practice case (Pet. App. A1-A12) are reported at 154 NLRB 1040. The Board's decision in the prior representation case (Pet. App. A13-A21) is unreported.

JURISDICTION

The decision of the court of appeals was entered on January 20, 1967, and a petition for rehearing was

denied on March 1, 1967 (Pet. App. A22). The petition for a writ of certiorari was filed on April 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer's contentions respecting the validity of a representation election conducted by the National Labor Relations Board and won by the union are ripe for review by this Court where the court of appeals, although overruling those contentions, has remanded the proceeding to the Board for further consideration of its finding respecting the appropriateness of the bargaining unit in which the election was conducted.

2. If the first question be answered affirmatively, there are these further questions:

(a) Whether a representation election conducted by mail is valid under the National Labor Relations Act.

(b) Whether the employer was properly denied leave to relitigate in the unfair labor practice proceeding an issue which he had an opportunity to litigate in the prior representation proceeding.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and of the Board's Rules and Regulations (29 C.F.R. 102.1 *et seq.*) are set forth in the Appendix, *infra*, pp. 8-9.

STATEMENT

Petitioner ("the Company") operates a truck freight line, which has 29 terminals located in five states (Pet. App. A1-A3). In March 1964, the International Brotherhood of Teamsters, Local Union No. 961 ("the Union") filed a representation petition requesting certification as bargaining agent for the drivers at the Company's terminal in Denver, Colorado (R. 146-149).[1] The Board's Regional Director overruled the Company's contention that only a system-wide unit was appropriate, and conducted a representation election by mail in the Denver unit, in which 14 votes were cast for the Union and 2 were cast against it. (Pet. App. A2, A13).

The Company filed timely objections to the election, contending that the mail balloting was not a "secret ballot" as required by the Act and the Board's Rules and Regulations (Pet. App. A14-A15). After investigation, the Regional Director overruled the Company's objections (Pet. App. A13-A21). The Director found that the mail election was necessary because the drivers could not be scheduled to vote at any single location within a reasonable period of time (Pet. App. A16). He further found that the election had been conducted in accordance with established Board procedures for mail elections, and that no evidence had been adduced to show that the secrecy of the balloting was impaired or violated (Pet. App. A19-A20). Accordingly, the Director certified the Union as the bar-

[1] "R" refers to the "Transcript of Record" in the court of appeals.

gaining representative of the Company's employees (Pet. App. A21). The Company filed with the Board a request for review of the Regional Director's decision, including a request for a hearing on its objections (R. 137-140). The Board denied the Company's request, concluding that it raised "no substantial issues warranting review" (R. 140).

Thereafter, the Company refused the Union's request to bargain, the Union filed unfair labor practice charges, and a complaint was issued (Pet. App. A1, A4). At the hearing before the Trial Examiner, the Company defended its refusal to bargain solely on the ground that the Union's certification was invalid (Pet. App. A4). The Examiner found that the issues raised by the Company had been resolved in the representation proceeding and that, since no newly available evidence had been offered, those issues could not be relitigated. Accordingly, the Examiner concluded that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (Pet. App. A7, A8-A9). The Board affirmed the Examiner's conclusion and ordered the Company to bargain, on request, with the Union (Pet. App. A9-A10, A12).

The court of appeals held that the Board had failed adequately to explicate the basis for its finding that a single terminal unit was appropriate, in view of its holding in an earlier case involving the same company that a three terminal unit was inappropriate. It therefore remanded the case to the Board for further consideration of the unit finding (Pet. App. A29-A31,

A35).[2] However, since the Denver unit might ultimately be found appropriate, the court went on to consider the Company's contentions that the mail election was unlawful and that it was wrongfully denied a hearing on its objections to the election, and found these contentions to be without merit (Pet. App. A31-A35).

ARGUMENT

1. Contrary to the Company's assertion (Pet. 1), the court of appeals entered no decree enforcing any portion of the Board's order. Rather, the court, finding that the Board had not adequately articulated the basis for its finding that the bargaining unit was appropriate in the present case, remanded the case to the Board for further consideration of its unit finding (Pet. App. A31). Thus, there is no outstanding court decree compelling the Company to obey the Board's order.

Although the Board recently reaffirmed its unit determination (see n. 2, *supra*), the court of appeals may or may not enforce the order based upon that decision. While the court of appeals rejected the Company's objections to the manner in which the election was conducted—a ruling that may preclude the Company from relitigating those objections in the court of appeals—the Company will have adequate opportunity to seek review of those issues in this Court if

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[2] In the remanded proceedings the Board on April 28, 1967, again held that the Denver terminal constituted an appropriate unit. *Groendyke Transport, Inc.*, 164 NLRB No. 28.

the court of appeals ultimately enforces the Board's order. Review at this time would therefore be premature.

2. In any event, there is no substance to the Company's contentions.

(a) Both the Act and the Board's Rules and Regulations simply provide that representation elections shall be "by secret ballot" (Appendix, *infra*, p. 9; Pet. App. A36); there is no requirement that manual, as opposed to mail, balloting procedures be used. Congress has entrusted the Board with broad discretion in conducting representation elections (*National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330), and the Board did not abuse that discretion here. As the court of appeals stated (Pet. App. A32), "ballot by mail is an accepted procedure throughout the country as not incompatible with the democratic process of secret balloting." The facts detailed in the court's opinion show (Pet. App. A33) that every effort was taken to safeguard the secrecy of the mail vote. No probative evidence was submitted to the Regional Director showing that the vote of any employee was in fact revealed (Pet. App. A19-A20).[3]

(b) The Board properly refused to permit the Company to reopen the issue of the secrecy of the

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[3] The fact that the Board's published rules do not specifically provide for mail ballots did not make the Board's action in this case invalid under the Administrative Procedure Act (See Pet. 15-17). An agency may promulgate rules through its decisional process, no less than through formal rule-making procedures. See *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202.

election at the unfair labor practice hearing. See Section 102.67(b) of the Board's Rules (Appendix, *infra*, p. 9). As the court below observed, nothing in the record indicates that the evidence which the Company sought to introduce was unavailable when the Company filed its post-election objections, "which were fairly considered by the Regional Director and disposed of" (Pet. App. A34). In the absence of a showing that the evidence was unavailable at the time of the representation proceeding, it was properly excluded at the unfair labor practice stage. *Pittsburgh Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 160-161; *National Labor Relations Board* v. *Rexall Chemical Co.*, 370 F. 2d 363 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1967.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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The relevant provisions of the National Labor Relations Board Rules and Regulations, Series 8, as amended (29 C.F.R. 102.1 *et seq.*), are as follows:

Sec. 102.67(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. * * *

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(f) * * * Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

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